IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 99-00272**
WEIL, FRED and MARSHA husband and wife,	)	
	)	
Debtors.	)	
_____	)	
	)	
WEIL, FRED and MARSHA, husband and wife,	)	**Adv. No. 99-6222**
	)	
Plaintiffs,	)	**MEMORANDUM OF DECISION**
	)	
vs.	)	
	)	
U.S. BANK, N.A., SALLIE MAE SERVICING CORPORATION, FIRST SECURITY BANK, N.A., TWIN FALLS FEDERAL SAVINGS, TCF BANKING AND SAVINGS, F.A., STUDENT LOAN FUND OF IDAHO MARKETING ASSOCIATION, INC., ALLIED INTERSTATE, INC., and UNITED STUDENT AID FUNDS, INC.,	)	
	)	
Defendants.	)	
_____	)	

Christian Brown, Boise, Idaho, for Plaintiffs.

Scott A. Tschirgi, JONES GLEDHILL HESS ANDREWS FUHRMAN BRADBURY & EIDEN, Boise, Idaho, for Defendant Educational Credit Management Corporation.

Judson W. Tolman, Fruitland, Idaho, for Defendant Student Loan Fund of Idaho.

Background

In this adversary proceeding, Plaintiffs Fred and Marsha Weil, Chapter 7 debtors, seek to discharge several student loan obligations they owe Defendants Educational Credit Management Corp. and Student Loan Fund of Idaho Marketing Association, Inc. under Section 523(a)(8) of the Bankruptcy Code. A trial was held on April 27, 2000, at which the parties submitted evidence and testimony. Thereafter, the Court took the issues under advisement. This Memorandum constitutes the Court's findings of fact and conclusions of law. Fed. R. Bankr. Proc. 7052.

Facts

Plaintiffs, both approximately fifty years of age, have been married for over eighteen years. They live in a 1984 mobile home in Eagle, Idaho, that they purchased from Marsha's mother. Plaintiffs have two daughters, ages 14 and 17.

Plaintiffs are both college graduates. Plaintiff Marsha Weil (hereafter, for convenience, "Marsha") attended Boise State University for three years following high school. She later obtained a bachelor's degree in cartography and geography from the University of Idaho and an associate's degree in computer-aided drafting (CAD) from ITT Technical Institute. Plaintiff Fred Weil ("Fred") holds two bachelor's degrees from St. Martin's College, one in sociology, the other in psychology. In addition, Fred has nearly completed a master's degree through a "distance learning" program offered by City University, leaving only the residency requirement incomplete. To obtain their post-secondary education, Plaintiffs borrowed approximately $152,000[1] over the years from several educational lenders.[2]

Marsha is employed full-time with Ada County as a "G.I.S. technician," or computer-aided drafting operator. She earns approximately $2,085 per month, and after payroll deductions takes home about $1,696. Her employment appears secure. Fred's employment situation is another matter. He

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[1] Plaintiffs stipulated that the outstanding balance with Defendant Educational Credit Management Corporation is $143,791.24, of which $89,307.34 is attributed to Plaintiff Fred Weil while $54,483.90 is attributable to Plaintiff Marsha Weil. The outstanding balance owed to Defendant Student Loan Fund of Idaho Marketing Association, Inc. is $8,296. *See* Defendant's Answer, filed October 5, 1999.

[2] Defendant Educational Credit Management Corporation is the successor in interest to Defendants Wells Fargo, MHESAC, and Sallie Mae Servicing Corp.

only occasionally works as a substitute teacher in the Nampa School District, earning about $65 per month. Plaintiffs suggest Fred has been otherwise unable to find suitable employment. Plaintiffs itemize $2,004 in monthly expenses on Schedule J of their sworn bankruptcy schedules filed with the Court.

Plaintiffs filed a Chapter 7 petition on February 9, 1999. This adversary proceeding was filed on September 17, 1999.

Discussion

A debtor cannot discharge a government guaranteed student loan unless the debtor can establish that excepting the debt from discharge "will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). While the term "undue hardship" is not defined by the Bankruptcy Code, definitions of the term have developed in case law. The Ninth Circuit has embraced the standard for determining undue hardship as it was applied in *In re Brunner*, 46 B.R. 752 (S.D. N.Y. 1985), *aff'd,* 831 F.2d 395 (2nd Cir. 1987). *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108 (9th Cir. 1998).

Under *Brunner*, a three-part test is employed to analyze whether a debtor faces undue hardship if a student loan is not discharged. "First, the debtor must establish 'that she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans.'" *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1111 (9th Cir. 1998) (quoting *In re Brunner*, 831 F.2d 395, 396 (2nd Cir. 1987)). Next, the debtor must establish additional circumstances suggesting the debtor's financial condition is likely to continue for at least a significant portion of the repayment period. *Id.* Finally, the debtor must have made a good faith effort to repay the obligation. *Id.*

A. Minimal Standard of Living

The first prong of the *Brunner* test is to determine whether Plaintiffs can maintain a minimal standard of living if required to pay their student loan obligations. "A minimal standard of living requires 'more than a showing of tight finances.'" *Salinas v. United Student Aid Funds, Inc. (In re Salinas)*, 240 B.R. 305, 314 (Bankr. W.D. Wisc. 1999) (quoting *Stein v. Bank of New England (In re Stein)*, 218 B.R. 281, 287 (Bankr. D. Conn. 1998)). The fact that a debtor may experience a tight budget in "the foreseeable future is the norm rather than the

exception." *Healey v. Massachusetts Higher Education (In re Healey)*, 161 B.R. 389, 393 (E.D. Mich. 1993).

In deciding whether Plaintiffs' circumstances satisfy the first prong, the Court, in its discretion, looks at Plaintiffs' income and expenses. *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1111 (9th Cir. 1998). Plaintiffs' Schedule I shows combined monthly take home income of approximately $1,749. This appears to be the best estimate of Plaintiffs' monthly income. Plaintiffs claim expenses of $2,004 on Schedule J. However, at trial, Plaintiffs introduced into evidence another summary of their monthly expenses. *See* Plaintiffs' Exhibit 62. The estimated monthly expenses detailed in this exhibit total $2,270.25, and included several additions or increased amounts over that listed on Plaintiffs' Schedule J.[3] For the most part, Plaintiffs' expenses are unremarkable and do not appear to the Court to be excessive. In addition, Defendants have not advanced any objection to the items or reasonableness of the amount of Plaintiffs' expenses. Accepting the information in Plaintiffs' exhibit, then, with expenses of $2,270.25, Plaintiffs' monthly budget shows a deficit of $521.25.

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[3] Exhibit 62 increased or added expenses for home maintenance, life insurance, food, legal fees, clothing, utilities, and retirement.

Plaintiffs' outstanding student loan obligations total approximately $152,000.[4] Several repayment plans are offered student borrowers under the various loan programs. Under a standard repayment plan of 120 months, with interest accruing at a rate of 8.25%, Plaintiffs must make monthly payments of $1,864.32 to retire this debt. *See* Defendant's Exhibit 204.[5] On an extended payment plan of 360 months, the monthly payment is $1,141.93. However, there is also a graduated plan offered to student debtors allowing payment over 360 months during which time the monthly payments gradually increase every two years. If Plaintiffs were to access the graduated payment plan, their monthly payment would be $1,045, as near as the Court can determine, for the first two years of repayment. Finally, Plaintiffs could elect an "income contingent plan," where payments are spread over 300 months and the amount of monthly

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[4] The Court recognizes two distinct obligations here, one to Defendant Educational Credit Management Corp. ("ECMC"), the other to Student Loan Fund of Idaho Marketing Association, Inc. ("SLFIMA"). Although the obligation to ECMC is substantial in comparison to that of SLFIMA, the two obligations will be consolidated for purposes of analysis under Section 523(a)(8). *See Raimondo v. New York State Higher Education Services Corp. (In re Raimondo)*, 183 B.R. 677, 680 (Bankr. W.D. N.Y. 1995) (the court explained that "no one obligation is more worthy of discharge than the other").

[5] Using the internet website indicated in Defendants' Exhibit 204 made available to assist in calculating repayment of student loans, http://www.ed.gov/offices/OPE/DirectLoan, the Court input the stipulated balances due on Plaintiffs' loans, together with Plaintiffs' 1999 tax return income information to arrive at the various payment amounts.

payments fluctuate according to Plaintiffs' tax return adjusted gross income ("AGI"). Under this plan, using Plaintiffs' 1999 AGI of $27,386, the current monthly payment would be $178.10. Over the life of the 300 month plan, Plaintiffs would make total payments of $139,636.92, over $12,000 less than the current outstanding principal balance. Any remaining balance is forgiven at the end of the 300 month payment plan.[6]

Under these facts, the Court concludes Plaintiffs cannot maintain a minimal standard of living if required to repay their student loan obligations under a standard, extended, or graduated repayment plan given the current monthly deficit between Plaintiffs' income and expenses. While the Court is not entirely convinced Plaintiffs could not satisfy their student loan obligations under the income contingency plan in the near future, the 300 month term of the plan would require Plaintiffs to make student loan payments until approximately age seventy-five. The Court finds Plaintiffs would be unable to maintain a minimal standard of living for a substantial portion of that type of repayment period.

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[6] Again, the Court is relying upon information contained on the public website cited above concerning the terms of this repayment program. This assumption (i.e., that at the conclusion of the repayment period the remaining balance would be forgiven) is a signficant one, and if in fact this term is not a part of the program, or if Plaintiffs do not qualify for that program, the Court reserves the right to reconsider its ruling in this action and adjust the rights of the parties.

Because of this conclusion, Plaintiffs have satisfied the first prong of the *Brunner* analysis.

B. Continuing Circumstances

Under the second prong of the *Brunner* test, Plaintiffs must show their financial condition is not likely to improve for at least a significant portion of the repayment period. At trial, Plaintiffs presented evidence suggesting Fred Weil was incapable of finding employment. This argument is critical to Plaintiffs' position. The Court declines to adopt Plaintiffs' view.

During the past five years, Fred has worked for a U.S. Senator, the Idaho Republican Party, as a physical education teacher at Rose Hill Montessori School in Boise, and as a substitute teacher in the Meridian, Emmett, Nampa, Boise, and Middleton school districts. This work has been occasional at best and Fred has continually sought out more permanent employment. The record includes a number of letters Fred has sent over the years to companies,[7] governmental entities, and educational institutions, both local and out-of-state, seeking positions in human resources, public administration, or a position working with students experiencing a learning disability. Fred was unable to

[7] Companies included Micron, Capital One, Boise Cascade, Zilog, Lockheed Martin, Ch2M Hill, and Direct TV to name a few. The Court presumes employment opportunities at these well-established companies is very competitive and at times regional, if not national, in scope.

secure employment with any of the companies, entities, or institutions to which he sent a resume.[8]

In addition, Fred testified he sought employment locally with several temporary placement agencies, Burger King, Shopko, K-Mart, Walmart, Office Max, Tates Rents, WITCO, The Arc, The Daily News in Kuna, auto dealerships, and engaged in several multilevel marketing programs such as Amway and Excel long distance phone service. Fred was not offered a position at any of these businesses. When asked if he was only looking for positions tailored to his background and education, Fred testified he sought general employment and had told potential employers he would take any position available. However, what is not clear is whether Fred submitted a general application and the employer presumed Fred desired a position in which he would use his educational experience. Thus, the Court is not convinced Fred could not obtain any job.

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[8] The Court questions whether Fred's education added value to his ability to find employment and increase his earning potential. However, as *Brunner* instructs, considering the value of the education in determining whether to discharge loans is improper. *In re Brunner*, 46 B.R. 752, 755 n. 3 (S.D. N.Y. 1985), *aff'd,* 831 F.2d 395 (2nd Cir. 1987). The rights of student loan creditors should not be prejudiced simply because they agreed (or in most cases were required) to finance an education, the cost of which outweighs any increased income value resulting to the student. If this practice causes economic hardship to the student, or to the efficient financial operation of the government sponsored student loan programs, it is a problem that must be addressed by Congress, not the Courts.

Defendants presented testimony of Mr. John Janzen, an employment rehabilitation expert. Janzen did not interview Fred, but did conduct an employment/wage analysis based on Fred's education and work experience. Janzen concluded Fred was employable in jobs such as an account collector or dispatcher and believed Fred could command a salary between $21,000 and $27,000 per year. While the Court agrees with Janzen that Fred is employable in some capacity, the Court is not inclined to accept the salary range Janzen suggests.

In addition, Fred asserts he cannot obtain just any job, particularly a manual labor job, because of life-long physical limitations. He complains he is slow, has poor hand-eye coordination, suffers from hypertension, and experiences headaches and heat rash when he works outside during the summer. Despite these limitations, Fred was active in sports in high school and college. His college transcript indicates he enrolled in courses of archery, self defense, scuba diving, baseball conditioning, track conditioning, track and field, sports officiating, varsity basketball, beginning tennis, varsity tennis, bowling, and badminton. In addition, Fred worked as a lifeguard. These courses and activities are not consistent with the kind of physical limitations Fred allegedly suffers. To the contrary, the record suggests Fred is capable of performing

certain athletic functions, which functions are more difficult and physically demanding than most jobs. The Court finds Fred does not have physical limitations preventing him from being gainfully employed.

Plaintiffs also assert Fred has learning disabilities that hinder his employment capabilities. Plaintiffs' witness, Ms. Mary Kohnke, is an educational therapist with A+ Adams & Associates, Inc. and she evaluated Fred on January 6, 2000. *See* Plaintiffs' Exhibit 1. The witness concluded that, under the federal guidelines, Fred did not suffer from a specific learning disability that could be objectively documented, nor did he suffer from dyslexia. She then, however, opined Fred could not obtain employment commensurate with his college degrees.

The Court finds Ms. Kohnke's testimony and report credible as far as it goes. While it is difficult for the Court to determine whether Fred indeed has physical and mental disabilities preventing him from obtaining employment, the evidence overwhelmingly suggests Fred cannot obtain employment in his field of study. However, while the Court believes Fred may not necessarily be able to obtain a job using his sociology/psychology background, the Court is not convinced Fred possesses disabilities that would prevent him from obtaining any kind of entry level position.

For example, while testifying at trial, Fred demonstrated his ability to understand questions and to appropriately articulate responses under obviously stressful circumstances. Such an ability, standing alone, should qualify Fred for a variety of entry level or manual labor positions. The Court concludes Fred is not unemployable. Rather, the Court suspects Fred may need to reevaluate his job seeking strategies and possibly focus his job search on employment he considers below his educational experience. If he does, the Court believes Fred's failure to secure employment should not continue.

Plaintiff Marsha Weil completed her most recent degree in 1998. She has permanent employment, and the evidence shows no reason her income could not be expected to increase over a significant portion of the loan repayment period. Thus, Marsha's circumstances do not prevent Plaintiffs from repaying their loans.

In summary, while they contend otherwise, the Court concludes Plaintiffs' current circumstances are not likely to persist for a significant portion of a typical loan repayment period. Fred should be able to obtain employment in an entry level position or performing manual labor, Plaintiffs' financial condition should likely improve, and Plaintiffs should have funds available to satisfy their

student loan obligations.[9] Plaintiffs have failed to prove the second prong of the *Brunner* test.

C. Good Faith

Finally, Plaintiffs must meet the final *Brunner* requirement, namely that of good faith. "With the receipt of a government-guaranteed education, the student assumes an obligation to make a good faith effort to repay those loans, as measured by his or her efforts to obtain employment, maximize income, and minimize expenses." *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993) (citation omitted). The standard of good faith under *Brunner* is similar, as it requires that a debtor, in order to show good faith, must make an effort to repay the loans or show "that the forces preventing repayment are truly beyond his or her reasonable control." *Brunner v. New York Higher Education Services Corp., (In re Brunner)*, 46 B.R. 752, 755 (S.D. N.Y. 1985), *aff'd* 831 F.2d 395 (2nd Cir. 1987).

The Court does not question Fred's good faith in attempting to find employment within his field of study. It is only reasonable to afford a recent graduate some period of time in which to find suitable employment within his or

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[9] If Fred could obtain even a minimum wage job at $5.15 per hour, for 40 hours per week, Plaintiffs would gross approximately an additional $800 per month. This amount should be sufficient to eliminate Plaintiffs' monthly deficit and provide money to begin to satisfy the student loan obligations.

her field of expertise. The question becomes what is that reasonable period of time. One year? Two years? Ten years?

Fred obtained his first bachelor's degree in 1982, and his second bachelor's degree in 1987. For at least the past thirteen years, Fred, armed with two degrees, has continually sought employment in his areas of study. To the Court, thirteen years goes far beyond a reasonable period of time in which to find specific employment. Failing to find permanent work during that period illustrates Fred's inability to find a job in his field of study. However, it does not suggest, nor did Plaintiffs prove at trial, that Fred could not find any other type of work. *See Brunner v. New York State Higher Education Services Corp. (In re Brunner)*, 46 B.R. 752, 757 (S.D. N.Y. 1985), *aff'd,* 831 F.2d 395 (2nd Cir. 1987). In fact, after such a lengthy period of futility, Fred should have sought out employment at any job. Therefore, the forces currently preventing repayment are not out of Plaintiffs' control.

Under the third prong, Plaintiffs must show they have made a good faith effort to repay the loans. As this Court stated in *Brown*, the failure to make even a single payment on a student loan obligation, when a debtor has not possessed the requisite resources to make such payments, does not necessarily preclude a finding that a debtor has attempted to repay the loans in good faith.

Brown v. Salliemae Servicing Corp. (In re Brown), 227 B.R. 540, 546-47 (Bankr. S.D. Cal. 1998), *aff'd in part, rev'd in part,* 239 B.R. 204 (S.D. Cal. 1999) (court erred by not allowing partial discharge of student loans) (citing *Lebovitz v. Chase Manhattan Bank (In re Lebovitz)*, 223 B.R. 265, 274 (Bankr. E.D. N.Y. 1998) ("a debtor's good faith is interpreted in light of his ability to pay, a complete failure to make even minimal payments on a student loan does not prevent a finding of good faith where the debtor never had the resources to make payments")).

Here, Plaintiffs have shown good faith by making some payments and also by seeking deferments of their obligations. While Plaintiffs have not explored various repayment plans to suit their income and specific situation, the Court is reluctant to find such failure was not in good faith.

While Plaintiffs have made a good faith attempt to repay their loans, the Court must conclude that Plaintiff Fred Weil has not maximized his income in light of his abilities to obtain any employment. Plaintiffs have therefore failed to prove the third prong of the *Brunner* test.

Conclusion

For the reasons set forth in this Memorandum, Plaintiffs' student loan obligations will not be discharged. While Plaintiffs did show that they could

not maintain a minimal standard of living if they were required to pay back their loans under their present budget, they did not show that their circumstances would continue throughout the repayment period, nor that their income had been maximized. The Court finds that Fred should be able to find employment sufficient to generate income allowing Plaintiffs to repay a portion of their loan balance through the "income contingent plan" offered by Defendants. However, if the Court's assumption that Plaintiffs can and will qualify for such a repayment plan proves incorrect, then Plaintiffs may request the Court to reconsider its decision in this action. But for now, and on condition Plaintiffs are eligible for such a repayment plan, the Court concludes the loans should not be discharged under Section 523(a)(8) of the Bankruptcy Code.

Counsel for Defendants shall jointly submit an appropriate form of judgment denying Plaintiffs' request to discharge the student loans, and dismissing this action.

DATED This _____ day of June, 2000.

_____
JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

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CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By_____
Deputy Clerk